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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 844

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* VINCENT MUMMIANI,
Petitioner-Appellant,
against
J. VERNEL JACKSON, etc., *et al.*, as Warden of Clinton Prison at Dannemora, New York,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause by the Attorney General of the State of New York, and opposes the petition herein and asks that it be denied.

Statement of the Case.

The petitioner prays for a writ of certiorari to review two orders of the Court of Appeals of the State of New York entered respectively on the 5th day of June, 1946 and the 9th day of October, 1946 in a proceeding upon a writ of habeas corpus.

The order of the Court of Appeals filed June 5, 1946 unanimously affirmed, without opinion, the order of the Appellate Division of the Supreme Court of New York which affirmed, *per curiam,* the order of the County Court of Clinton County dismissing the writ and remanding the petitioner. The order of the Court of Appeals filed October 9, 1946 unanimously denied petitioner's motion for reargument. No opinions were written by the County Judge or the Court of Appeals. The memorandum decision of the Appellate Division is reported in 269 App. Div. (N. Y.) 919.

The Facts

Appellant was indicted on March 27, 1931 for the crime of murder in the first degree on account of a killing with a firearm. He was tried, convicted on June 19, 1931 and sentenced to death. Judgment of conviction was reversed and a new trial ordered (258 N. Y. 394).

During the course of appellant's retrial in April 1932, his plea of guilty to murder in the second degree was accepted.

On April 22, 1932, the Court of General Sessions of New York County sentenced appellant to an indeterminate sentence of not less than thirty (30) years and a maximum of life, five (5) years of the minimum being imposed as increased punishment pursuant to Section 1944 of the Penal Law because in the commission of the substantive crime he was armed.

On February 19, 1940, the Appellate Division, Second Department, ordered that a writ of habeas corpus obtained by relator be sustained and the matter remanded to the Court of General Sessions of New York County for de-

termination, upon a proper record, whether relator was armed within the meaning of Section 1944 of the Penal Law. The opinion of the Appellate Division is reported in 258 App. Div. 643.

After taking testimony and making proper inquiry pursuant to said order that Court found that appellant was armed while committing the crime of murder in the second degree. This was in accord with the testimony upon the first trial that the victim's body was pierced with bullet holes (258 N. Y. 394).

The Court, having remedied the procedural defect, on April 1, 1941 ordered that the sentence of April 22, 1932 be vacated and then reimposed the same sentence. No appeal was taken by the petitioner from the original sentence nor from the correction thereof by resentence but three habeas corpus proceedings, of which this is the latest, were brought by him, all of which resulted in dismissals. The petitioner was physically present in court both upon the sentence and the resentence.

The petitioner previously addressed this Court in December 1941, seeking certiorari. His petitions were Nos. 790 and 791, October Term 1941 and the decisions thereon are reported in 314 U. S. at page 698. At that time he offered the same contentions, allegations and arguments which are contained in his present application. On January 5, 1942, the Clerk of this Court wrote to the Attorney General of the State of New York as follows:

"Dear Sir:

I write to advise you that in the cases of Mummiani v. People of the State of New York, and People of the State of New York, *ex rel.* Mummiani, v. William E. Hunt, as Warden of Attica State Prison, *et al.*, Nos. 790 and 791, October Term, 1941, the Court today ordered—

The motions for leave to proceed further herein *in forma pauperis* are denied for the reason that the Court, upon examination of the papers herein submitted, finds no ground upon which writs of certiorari should be issued.

The petitions for writs of certiorari are therefore also denied.

Yours truly

CHARLES ELMORE CROPLEY, *Clerk*,
By (Signed) H. B. WILLEY
Deputy."

On December 10, 1942, a copy of the Clerk's letter was forwarded to this petitioner.

POINT I.

The Fifth Amendment is restrictive of Federal action only, and is without application to action by the States.

The petitioner, on pages 10, 11 and 12 of his petition, poses eleven questions for the consideration of this Court. Only the first thereof in any way contains a constitutional question, alleging a violation of the Fifth Amendment to the Constitution (double jeopardy).

The principle that the Fifth Amendment is without application to action by the States was announced by this Court more than one hundred years ago and has been adhered to ever since.

Barron v. *Baltimore* (1883), 7 Pet. 243;
Twining v. *New Jersey* (1908), 211 U. S. 78;
Palko v. *Connecticut* (1937), 302 U. S. 319, 322;
Feldman v. *United States* (1943), 322 U. S. 487, 490.

"But for more than one hundred years, ever since *Barron* v. *Baltimore*, 7 Pet. 243, one of the settled principles of our Constitution has been that these Amendments (Fourth and Fifth) protect only against invasion of civil liberties by the Government whose conduct they alone limit."

Frankfurter, J., in *Feldman* v. *United States*, *supra*, p. 490.

POINT II

The Courts of the State of New York have the power to determine and correct erroneous sentences and their action in so doing violates no provision of the Federal Constitution.

The appellant in this case does not seriously dispute that the later indeterminate sentence was the proper sentence to be imposed upon him rather than the previous one. He takes the position that the court, having committed an error in the original sentence, was thereafter wholly powerless to correct the same, and that thus he becomes entitled to his freedom, escaping all punishment for the murder which he had committed, and for which he was tried and convicted.

Although some such astounding result was achieved by the courts of the State of New York at the beginning of the nineteenth century, it has been uniformly held for more than seventy years that an erroneous sentence may be corrected and that the imposition of such corrected sentence does not constitute double jeopardy in violation of the Constitution of the State of New York.

People ex rel. Miresi v. *Murphy*, 253 App. Div. 441, leave to appeal to the Court of Appeals denied 254 App. Div. 800, 278 N. Y. 741.

As we have seen, the Fifth Amendment is not available to the petitioner. Although he vaguely contends that the correction of his sentence in some way violated the provisions of the Fourteenth Amendment, it is entirely apparent that the correction of the sentence did not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," which is the established criterion under the due process and privileges and immunities clauses of that Amendment.

> *Palko* v. *Connecticut, supra,* p. 325;
> *Brown* v. *Mississippi* (1936), 297 U. S. 278, 285;
> *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 105;
> *Hebert* v. *Louisiana* (1926), 272 U. S. 312, 316;
> *Rogers* v. *Peck* (1905), 199 U. S. 425, 434.

Certainly no fundamental principle of justice is offended by having an erroneous sentence corrected by the imposition of a proper one. On the contrary, the principles of justice would be definitely outraged, were the imposition of an erroneous sentence to result in the complete liberty of a murderer. As was stated in *People ex rel. Miresi* v. *Murphy, supra,* p. 444:

> "It would be an amazing doctrine to hold that the law is so helpless, so inadequate to public needs, that a prisoner whose guilt is clearly established should escape punishment merely because the court erred in passing sentence. That is just what relator asserts. We cannot sanction such a contention."

POINT III.

There is no merit in the petitioner's contention that the insertion of the words "*nunc pro tunc*" in the resentence deprived him of a constitutional right.

The insertion of the words "*nunc pro tunc*" in the sentence and commitment under which the petitioner is held was for the benefit of the petitioner and in the interest of clarity, and has resulted in petitioner's minimum sentence expiring in 1951 rather than in 1961. The insertion of these words also make it possible to allow to the petitioner credit for good conduct time earned.

CONCLUSION

It is thought that this cause presents no question within the jurisdiction of this honorable court and that the petition accordingly should be denied.

Dated: January 2, 1947.

Respectfully submitted,

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